UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ROBERT E. LAING, et ux.,	)	
Plaintiffs	)	
v.	)	
GEORGIA-PACIFIC CORP. and RUST INTERNATIONAL CORP.,	)	***Civil No. 92-231 B***
Defendants and Third-Party Plaintiffs	)	
v.	)	
PAPER, INC.,	)	
Third-Party Defendant	)	

RECOMMENDED DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT ON THIRD-PARTY COMPLAINTS

This action arises out of an incident that occurred while plaintiff Robert Laing was employed by third-party defendant Paper, Inc (``Paper''). Paper entered into a subcontract with National Industrial Constructors whereby it agreed to perform work at the Millinocket plant of Great Northern Paper Company. Defendant Georgia-Pacific Corporation (``Georgia-Pacific'') is the successor in interest to Great Northern Paper Company. Defendant Rust International Corporation (``Rust'') was the engineer on the project.

Laing filed this action in November 1992 alleging negligent maintenance of his work area by Georgia-Pacific and Rust.[1] In July 1993 both defendants filed third-party complaints against Paper on the basis of defense and indemnity provisions in the subcontract pursuant to which Paper

[1] Plaintiff Roslyn Laing, Robert Laing's wife, seeks damages for loss of consortium.

was employed.[2]

Discussion

Presently before the Court are cross-motions for summary judgment on the third-party complaints filed by each of the respective parties. Summary judgment is appropriate only if ``the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining if this burden is met, the court must view the record in the light most favorable to the nonmoving party and ``give that party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990) (citation omitted). ``Once the movant has presented probative evidence establishing its entitlement to judgment, the party opposing the motion must set forth specific facts demonstrating that there is a material and genuine issue for trial." *Id*. at 73 (citations omitted); Fed. R. Civ. P. 56(e); Local R. 19(b)(2). A fact is ``material" if it may affect the outcome of the case; a dispute is ``genuine" only if trial is necessary to resolve evidentiary disagreement. *Ortega-Rosario*, 917 F.2d at 73.

In this case, the facts surrounding Laing's accident are not seriously disputed. On October 24, 1990 Paper rented a car to take Laing and his co-workers to work on a pulp washer rebuild project at the Millinocket mill. This date was his seventh day at work on the site. Frequently, the pulp washers on which Laing was working would overflow. Depending on the severity of the spill, a buzzer might signal to the employees that they must evacuate the work area.

[2] In addition, Georgia-Pacific has filed a cross-claim against Rust on the basis of defense and indemnity provisions in the contract pursuant to which Rust was employed. The cross-claim is not at issue in these motions for summary judgment.

On October 24, 1990 the pulp washers at the work site overflowed to an extent requiring evacuation of the workers. Laing and other employees were told to wait outside, where a car would transport them to the motel where they were living. They were instructed to wait at the motel in case they could be called back to work for the remainder of their shift.

The car did not arrive immediately and it was raining. Laing re-entered the building to ask the superintendent about the status of the car. As he descended a spiral stairway on his way out of the building, Laing fell, allegedly slipping on grease or other liquids that had been tracked onto the staircase.

The subcontract pursuant to which Paper was performing work at the Millinocket Mill contains the following provisions:

> 13. INDEMNIFICATION
>
> (a) Subcontractor agrees for itself and its insurers to indemnify, defend and hold harmless Contractor, Engineer, Owner and their parent, subsidiary and affiliated companies and their respective agents, officers, directors, employees and assigns from and against any and all liabilities, claims, losses, damages, penalties, costs or expenses (including but not limited to court costs and reasonable attorney's fees) for damage to property of whatsoever kind or nature or injury to persons (including, but not limited to death) arising out of or due to or claimed to have arisen out of or been due to the design, manufacture, delivery, installation, use, maintenance, repair, or operation of any part or all of the goods, material, and equipment, if any, supplied by Subcontractor, or the performance of the Work by Subcontractor, its agents, independent contractors, Sub-Subcontractors, Vendors, and each of their agents, officers, or employees, or any other operation no matter by whom performed for or on behalf of Subcontractor. Subcontractor's obligations under this indemnity shall not extend to property damage or personal injury caused by the sole negligence of the indemnitee or its agents, officers, directors, employees and assigns.
>
> (b) In the event and to the extent that a claim is made by an employee of Subcontractor against an indemnitee hereunder, the intent of this ARTICLE is that Subcontractor shall and it hereby agrees to indemnify Owner, Engineer, Contractor and their parent, subsidiary or affiliated companies and each of their agents, officers,

directors, employees and assigns to the same extent as if the claim was made by a non-employee of Subcontractor. Accordingly, in addition to the above provisions, and in order to render the parties' intent and this indemnity agreement fully enforceable, Subcontractor, in an indemnification claim hereunder, hereby expressly and without reservation waives any defense or immunity it may have under any applicable Worker's Compensation Laws or any other statute or judicial decision disallowing or limiting such indemnification and consents to a cause of action for indemnity. Such waiver and consent to indemnification is made irrespective of and specifically waiving any defense or immunity under any statute or judicial decision, such as without limitation, Section 25-5-53 Code of Alabama 1975, *Gunter v. United States Fidelity & Guaranty Co.* (Ala. 1976), *Paul Krebs & Associates v. Mattees & Fritts-Construction Co.* (Ala. 1976), *Brown vs. Prime Construction Company, Inc.* (Wash. 1984) and *Diamond International Corporation v. Sullivan and Merritt Inc.* (Maine, 1985) or any similar statute or judicial decision disallowing or limiting such indemnification.

* * *

14.1 INSURANCE REQUIREMENTS

(a) Subcontractor shall provide and maintain in full force and effect the insurance coverages specified in Exhibit I, Insurance Requirements, with limits of liability not less than those shown therein, and for the periods stated therein. Such insurance shall be primary to any insurance maintained by Contractor or Owner.

(b) Owner, Engineer, and Contractor shall be named as additional insureds under all Subcontractor's insurance policies, which shall include a cross-liability and severability of interests clause. Each policy shall be endorsed to provide a waiver of any and all of each insurer's rights of subrogation against the Contractor, Owner, Engineer, and their corporate affiliates, officers, employees and agents.

(c) All certificates of insurance furnished by Subcontractor to evidence its insurance coverages shall provide for 30 Days' written notice by the insurer to Owner and Contractor prior to the cancellation or material change of any insurance referred to therein.

(d) Before any Work is performed under this Subcontract, written proof of compliance with the requirements of this ARTICLE shall be furnished to Contractor on a certificate furnished by or satisfactory to Contractor and Owner and executed by an authorized

> representative of Subcontractor's insurer. A certificate that contains wording that in any way reduces or lessens the insurer's obligations or that does not fulfill all requirements of this ARTICLE will not be acceptable. Contractor may also at any time call for and Subcontractor shall promptly furnish true and exact copies of all policies of insurance affording the coverage required herein, together with any endorsements or changes thereto.

Subcontract Pt. IV.B. 13, 14, at 11-12 (``General Conditions").

Georgia-Pacific, as successor to the ``Owner," and Rust, as the ``Engineer," argue that they are entitled to judgment as a matter of law based on both the indemnification clause and the insurance procurement clause in the subcontract. These issues present questions of law only if the terms of the contract are unambiguous. *Fowler v. Boise Cascade Corp.*, 948 F.2d 49, 54 (1st Cir. 1991) (citing *Portland Valve, Inc. v. Rockwood Systems Corp.*, 460 A.2d 1383, 1387 (Me. 1983)). A contract is construed by examining the entire document. *Id*. at 58 (quoting *Peerless Ins. Co. v. Brennon*, 564 A.2d 383, 385 (Me. 1989)).

A. Indemnification Clause

Genuine issues of material fact exist regarding whether the indemnity clause applies to Laing's claim. First, the indemnity provision does ``not extend to property damage or personal injury caused by the sole negligence of the indemnitee or its agents, officers, directors, employees and assigns." Therefore, should a jury find either of the defendants solely responsible for Laing's injuries, they are not entitled to indemnification.[3] Second, the provision applies to claims ``arising

[3] The defendants argue that Paper assumed all of their liability by reason of a provision in the subcontract that states:

> Subcontractor assumes toward Contractor with respect to the Work to be performed under this Subcontract all of the obligations, duties, and responsibilities that Contractor assumes toward Owner under Contractor's Contract with Owner and under applicable law.

Subcontract Pt. I, at 1 (``Signatory Document").

I disagree. The subcontract required the contractor to designate a ``construction gate" through which employees of Paper were required to enter their work area. *See* General Conditions 25.12(b), at 18. The spiral stairway at issue in this matter is, apparently, a required obstacle given the designated ``construction gate." The ``Special Conditions" section of the subcontract

out of or due to or claimed to have arisen out of or been due to . . . the performance of the Work." For purposes of the subcontract, ``Work" is defined to include ``design, engineering, labor, supervision, materials, machinery, equipment, tests, guarantees, transportation, supplies, services, and incidentals." General Conditions 1.1(x). To determine whether Laing's claim qualifies for coverage under the indemnification provision, it will be necessary to determine whether Laing's actions in entering the building to verify that transportation was forthcoming arose out of, or were due to, the ``Work." This determination must be made by a factfinder.[4] Summary judgment is accordingly inappropriate for any party on the issue of indemnification.

B. Insurance Procurement Clause

Neither defendant has purported to state a separate cause of action for breach of the insurance procurement clause of the contract. Both, however, have argued that they are entitled to summary judgment on the basis of the insurance procurement clause. Because Paper has thoroughly responded to the arguments, I find that it has consented to having this issue addressed.

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specifies the duties of Paper with regard to safety, *see* Subcontract Pt. IV.A. 2(A), at 1-2, and there is a separate section regarding Paper's ``housekeeping" duties, *see* General Conditions 25.6, at 17. These duties do not appear to extend beyond the ``work area." *See id.* It is not clear on the face of the subcontract that the spiral stairway may be considered part of Paper's ``work area." Further, the ``housekeeping" provision exempts from Paper's responsibility the cleanup of hazardous or toxic materials. *Id.*

Similarly, I do not read Article 11 of the general conditions of the subcontract as broadly as the defendants would like. *See* General Conditions 11, at 10-11. Given the duty to construe separate provisions of a contract in light of the entire contract and given the subcontract provisions discussed above specifying certain areas of responsibility, I cannot read Article 11 as the exclusive word on liability. In addition, I note that the subcontract appears to define the job site as ``Millinocket, Maine," a geographic limitation with no useful limit. *See* Signatory Document at 1.

[4] I reject the defendants' argument that the proper interpretation of the term ``arising from" is found in the caselaw interpreting the Maine Workers' Compensation Act. First, the defendants cite no authority for this proposition. Second, there is a clear distinction in Maine law between the liberal construction of the term in the context of workers' compensation and the appropriate analysis for contractual indemnification, which requires ``strict construction" to avoid contravening the employer immunity provisions in the Workers' Compensation Act. *Compare Comeau v. Maine Coastal Servs.*, 449 A.2d 362, 367 (Me. 1982) (``The crucial question is whether a sufficient work-connection has been exhibited so as to justify an award of compensation under a liberal interpretation of this remedial Act.") *with Diamond Int'l Corp. v. Sullivan & Merritt, Inc.*, 493 A.2d 1043, 1048 (Me. 1985) (``Employing [strict requirements] when interpreting indemnity provisions will safeguard from relinquishment the statutory immunity granted to employers.").

1. *Breach of the Insurance Procurement Clause*

Georgia-Pacific concedes that Paper did, indeed, procure general commercial liability insurance naming Georgia-Pacific an ``additional insured." Paper is therefore entitled to judgment as a matter of law on Georgia-Pacific's claims arising under the insurance procurement clause.

Paper concedes that it did not obtain such insurance naming Rust an ``additional insured." Rust is therefore entitled to judgment as a matter of law on the issue of whether Paper breached the insurance procurement clause.

2. *Indemnification Based on Breach of the Insurance Procurement Clause*

Given Paper's breach of the insurance procurement clause, Rust asserts that Paper is contractually bound to indemnify Rust for Laing's claims against Rust. Under Maine law, a party who agrees to obtain insurance for another does not by that agreement become an insurer; however, he may assume the liabilities of one if he breaches the agreement by failing to procure the required insurance. *Boise Cascade Corp. v. Main-Erbauer, Inc.*, 620 A.2d 280, 281 (Me. 1993) (quoting *Zettel v. Paschen Contractors, Inc*, 427 N.E.2d 189, 191 (Ill. App. Ct. 1981)). To determine whether Paper is bound to indemnify Rust in light of its failure to procure the required insurance, it is, of course, first necessary to determine whether Paper's policy would have covered Laing's claims. *See Zettel*, 427 N.E.2d at 192. No party has presented the court with a copy of the actual policy naming Georgia-Pacific as an additional insured. Pursuant to this court's order, Paper provided the defendants with a copy of a policy it claimed was in effect at the time of the incident giving rise to this action.[5] Rust has attached this copy to its statement of material facts and I will accept it as offered.

The ``Additional Insured" endorsement attached to Paper's commercial general liability

[5] The insurance company file regarding Paper's policy has been misplaced.

policy contains the following provisions:

> 1. WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization (called ``additional insured") shown in the Schedule but only with respect to liability arising out of:
>
> A. ``Your work" for the additional insured(s) at the location designated above, or
>
> B. Acts or omissions of the additional insured(s) in connection with their general supervision of ``your work" at the location shown in the Schedule.

The endorsement specifically *excludes* coverage for:

> (3) ``Bodily injury" or ``property damage" arising out of any act or omission of the additional insured(s) or any of their employees, other than the general supervision of work performed for the additional insured(s) by you.

Laing's claims against Rust center on its alleged failure to take safety precautions. Rust cites a Florida Court of Appeals case for the proposition that Laing's allegation of negligent failure to maintain a safe place to work suffices to allege an omission within Rust's ``general supervision of [Paper's] work." *Continental Cas. Co. v. Florida Power & Light Co.*, 222 So. 2d 58, 59 (Fla. App.), *cert. denied*, 229 So.2d 867 (Fla. 1969). The ruling in *Continental Casualty* does not apply as easily to this case, however.

First, the Florida court explicitly stated that its ``interpretation [was] authorized under the principle that any ambiguous term of an insurance policy will be most strongly construed against the insurance company." *Id*. This principle does not govern in this case for the simple reason that Paper is not the insurance company. Paper had no more control over the language of the policy than Rust would have had as a named insured.

Second, in *Continental Casualty* the plaintiff's complaint alleged failures to inspect the work site and equipment on which the plaintiff's employer was to perform the work and to take precautions to protect the plaintiff while he was doing the work. It also asserted that Florida Power & Light ``negligently required the work to be done upon a high voltage electrical transmission line

which was so situated that there was a great danger of grounded material and equipment thereon being energized." *Id*. The allegations against the Florida Power & Light Company related much more directly to the specific work, and work *site*, than do the allegations in this case.

I am satisfied that I cannot find, as a matter of law, that Rust would have been covered under Paper's policy. Conversely, I cannot find as a matter of law that it would not have been covered. Summary judgment is therefore inappropriate for either party on Rust's third-party complaint on the issue of indemnification based on Paper's breach of the insurance procurement provision of the subcontract.

Conclusion

Accordingly, I recommend that defendant Rust's motion for summary judgment on its third-party complaint be **GRANTED** on its breach of the insurance procurement clause claim and **DENIED** on its indemnification claims, and that defendant Georgia-Pacific's motion for summary judgment on its third-party complaint be **DENIED**. I further recommend that third-party defendant Paper's motion for summary judgment on Georgia-Pacific's third-party complaint be **GRANTED** on the breach of the insurance procurement clause claim and **DENIED** on the indemnification clause claim, and that Paper's motion for summary judgment on Rust's third-party complaint be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 29th day of June, 1994.

David M. Cohen
United States Magistrate Judge